Supreme Court, U.S.
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No. 02-1284 FEB 19 2003

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In the
Supreme Court of the United States

ILLINOIS,

Petitioner,

vs.

AARON D. SWIFT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois

LISA ANNE HOFFMAN
MARY BETH BURNS
Counsel of Record
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3565

Attorneys for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which invalidated the procedure used to impose a mandatory enhancement, should be distinguished from a procedure for judicially imposing a discretionary extended term, because the language and reasoning in *Apprendi* are directed at sentencing statutes that serve to create additional elements of an offense.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of Illinois, respectfully requests that this Court issue a writ of *certiorari* to the Supreme Court of Illinois to review that court's judgment and opinion entered on November 21, 2002.

OPINIONS BELOW

The Supreme Court of Illinois, on November 21, 2002, issued a published opinion in this case, *People v. Swift*, 202 Ill.2d 378, 781 N.E.2d 292 (2002). This decision is reprinted in the appendix to this petition. The May 22, 2001, published opinion of the Illinois Appellate Court is also reprinted in the appendix to this petition. *People v. Swift*, 322 Ill.App.3d 127, 750 N.E.2d 294 (2nd Dist. 2001).

JURISDICTION

The Supreme Court of Illinois entered its opinion on November 21, 2002. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a), since, in the proceedings in the state courts of Illinois, Respondent asserted an alleged violation of his rights arising under the United States Constitution.

STATEMENT OF THE CASE

The respondent, Aaron Swift, was charged by indictment with committing the offense of first degree murder for the stabbing death of 19 year old Karzell Anderson. The murder stemmed from a failed drug transaction, and took place over several hours on February 19, 1998. At one point the respondent promised his sister that he would get help for the victim, but instead cut his throat so he could not tell people at the hospital who had injured him.

The respondent was tried by a jury, and he was found guilty. The trial court sentenced him to an extended term of 80 years, finding the offense to be brutal and heinous, indicative of wanton cruelty. The Appellate Court of Illinois, Second District, affirmed the jury's verdict, but vacated the extended term sentence because it found Section 5-8-2 of the Illinois Code of Corrections to be unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Swift*, 322 Ill.App.3d 127, 750 N.E.2d 294 (2d Dist. 2001). (App. at 15).[1] The Petitioner appealed to the Supreme Court of Illinois, which affirmed in part and vacated in part. *People v. Swift*, 202 Ill.2d 378, 781 N.E.2d 292 (2002). (App. at 1). Specifically, the supreme court disagreed with the appellate court's determination that the statute was facially unconstitutional. (App. at 14). The court found the procedure used to impose the extended term to be invalid, however, because the trial court made the determination at sentencing rather than submitting the aggravating factor to the jury for a finding based on proof beyond a reasonable doubt. (App. at 2-6, 13-14). The state supreme court concluded that the extended term provision took the sentence beyond the statutory range, and that, "According to *Apprendi*, any factual findings which take a

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[1] "App." refers to the Appendix attached to this petition.

sentence above the sentencing range must be proven to a jury beyond a reasonable doubt." (App. at 14).

Petitioner, the People of the State of Illinois, now seeks a writ of *certiorari* from this Court to review the judgment and opinion of the Supreme Court of Illinois.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Supreme Court Of Illinois Misconstrued *Apprendi v. New Jersey*, 530 U.S. 466 (2000), As Requiring The Submission Of A Discretionary Extended Term Sentencing Factor To A Jury, Though The Discretionary Factor Did Not Act As An Element Of The Offense As Had The Mandatory Factor At Issue In *Apprendi*.

The respondent was charged by indictment with first-degree murder. He was found guilty by a jury, and the trial court imposed an extended term sentence of 80 years in the Department of Corrections. The Supreme Court of Illinois vacated the extended term based on its determination that the procedure used to find the sentencing factor is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). *People v. Swift*, 202 Ill.2d 378, 781 N.E.2d 292 (2002) (App. at 2-6, 13-14). The Petitioner now asks this Court to grant *certiorari* and reverse the court's determination, because the extended term statute does not offend this Court's reasoning in *Apprendi*.

In *Apprendi*, this Court considered a New Jersey procedure requiring the trial judge to impose an extended term sentence upon finding, by a preponderance of the evidence, that the defendant, when committing the offense for which he was being sentenced, had acted with a racially biased purpose. N.J.Stat. §2C; 44-3. The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum[2] must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. This holding is based on the concern that "the effect of New Jersey's sentencing 'enhancement' here is unquestionably to turn a second degree offense into a first degree offense under the State's own criminal code." *Apprendi*, 530 U.S. at 494. Both the nature of the statute and this Court's analysis thus appear to support the inference that the opinion addressed the situation actually before the Court, and that the statute at issue here does not offend that reasoning.

The extended term provisions in Illinois do not work in the same manner as the statute found to be unconstitutional in *Apprendi*. Unlike the New Jersey provision, where an enhanced sentence was required if the crime was shown to be a hate crime, the Illinois sentencing scheme at issue leaves the sentencing judge the discretion not to give an extended term sentence even if one of the triggering factors in section 5-5-3.2 is found to exist. "Where the judge finds that such factors [from section 5-5-3.2] were present, he may sentence an offender to the following: first-degree murder, a term shall not be less than 60 years and not more than 100 years." 730 ILCS 5/5-8-2(a)(1) (emphasis added). The presence of such discretion to select a non-extended term sentence despite proof of the presence of an aggravating factor takes Illinois' sentencing scheme outside of the coverage of *Apprendi*.

Additionally, extended term factors do not augment the offense class for sentencing purposes, as does the recidivist provision in Section 5/5-5-3(c)(8), for instance, which provides for Class X sentencing for certain offenders convicted of Class 1 or Class 2 felonies. 730 ILCS 5/5-5-3(c)(8). Nor do

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[2] The Supreme Court of Illinois determined that the statutory maximum for first degree murder is 60 years. *Swift*, 202 Ill.2d at 385-392 (App. at 6-13).

the factors operate like specific aggravating factors within the Criminal Code, which are clearly viewed as elements of enhanced crimes that create greater class offenses. Intentionally or knowingly causing great bodily harm elevates battery, a misdemeanor, to aggravated battery, a Class 3 felony. 720 ILCS 5/12-3(b); 720 ILCS 5/12-4(a) and (e). Confining or restraining the victim raises stalking, a Class 4 felony, to aggravated stalking, a Class 3 felony. 720 ILCS 5/12-7.3(b); 720 ILCS 5/12-7.4(a)(2) and (b). Similarly, the display of a dangerous weapon, other than a firearm, takes criminal sexual assault, a Class 1 felony, to aggravated criminal sexual assault, a Class X felony. 720 ILCS 5/12-13(b)(1); 720 ILCS 5/12-14(a)(1) and (d)(1).

In these situations, once the finder of fact enters a verdict on the higher class offense, the sentencing judge has no discretion to impose a sentence based on the lower class sentencing range. As in *Apprendi*, the presence of the aggravating factor requires imposition of a sentence at the higher range. In contrast, the aggravating factor here did not require the judge to impose an extended term. The judge's discretion distinguishes the sentencing scheme at issue from the provision considered in *Apprendi*.

The Supreme Court of Illinois recognized the differences between the statutes, but concluded that this Court's analysis did not rely on these distinctions, and so the "distinctions make no difference." (App. at 4). The problem with this conclusion is that it divorces this Court's reasoning from the case actually before it in *Apprendi*. Such a severance cannot be proper, since it would render *Apprendi* little more than an advisory opinion.

This Court again considered "the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence" in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 2409-2410 (2002). In *Harris*, both the majority and dissent seriously considered what

actually constitutes a crime, but a good explanation is provided early in the lead opinion: "Legislatures define crimes in terms of the facts that are their essential elements." *Id.* That being the case, a discretionary sentencing factor would seem not to constitute an "essential element," since its proof does not require additional punishment. As this Court continued:

> . . . not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

Harris, 536 U.S. at ___, 122 S.Ct. at 2410. Again, the factor at issue neither raises the class of the offense nor requires imposition of greater punishment. Therefore, it should not constitute an element of the underlying felony. Since such a factor does not constitute an element, the right to a jury trial is not compromised by judicial determination of the presence of the factor within the surrounding circumstances of the offense.

In making this argument, Petitioner recognizes this Court's directive that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. The effect here remains the court's discretion to find the factor proven but the extended sentence unwarranted.

Petitioner is also mindful of this Court's concern that a sentencing scheme that provides for judicial determination of facts that "expose" defendants to greater punishment may raise serious constitutional issues. *Apprendi*, 530 U.S. 486, discussing *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88, 106 S.Ct. 2411 (1986). Despite this Court's concern, mere "exposure" to greater punishment cannot be the answer to the question, because exposure alone does not lead to the conclusion that the legislature found the factors sufficiently significant to the actual offense to fit within "the facts that are [the crime's] essential elements." *Harris*, 536 U.S. at ___, 122 S.Ct. at 2409-2410. The Supreme Court of Illinois erred in finding this distinction meaningless, (App. at 4), because it goes to the heart of the question grappled with in *Apprendi* and *Harris*: what are the true components of a crime, the elements that trigger the Constitution's jury trial protections? The hate crime factor in *Apprendi* constitutes such an essential element, not because it opens the door to the possibility of greater punishment, but because its presence absolutely requires greater punishment. In contrast, the factor at issue here, brutal and heinous behavior indicative of wanton cruelty, does not absolutely require the imposition of the available extended term. Instead, even when the factor is proven, the sentencing judge retains the discretion whether to impose the extended term sentence or to impose a sentence within the lower range. Again, this discretion takes this factor outside the essential elements of first degree murder.

Finally, perhaps the most important policy reason that supports the position that the Illinois statute does not violate *Apprendi* is the longstanding tradition that the States have the right to define the elements of their own offenses. *See McMillan v. Pennsylvania*, 477 U.S. at 85, discussed in *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting). Implicit within that right is the legislature's authority to distinguish between factors so significant that they

are defined as elements and raise the class of the felony, and factors sufficiently significant that they may increase possible punishment, but not so crucial that they raise the class of felony, nor, based on the surrounding circumstances, that their proof requires extended punishment. This Court alludes to this concern in responding to a point raised in the dissent. *See Apprendi*, 530 U.S. at 490 n.16. In discussing the exercise of mitigation to lower a sentence, the Court illustrates the difference between an element and a sentencing factor by considering a defendant whose status as a war veteran could be mitigating. *Id.* If an element of an offense is proven, however, mitigation cannot be used to lower the class of felony, and a defendant must be sentenced to at least the minimum term for that class felony. In contrast, if a sentencing factor is established under the extended term provision, the legislature gives the trial court the discretion to rely on mitigation in not imposing an extended term sentence. This is a distinction that should be drawn by state legislatures.

The Petitioner thus asks this Court to grant certiorari in order to show that *Apprendi*'s reasoning is properly limited to the type of mandatory enhancement that was at issue there, and to capital factors like that at issue in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

CONCLUSION

For the aforementioned reasons, Petitioner, the People of the State of Illinois, respectfully requests that this Honorable Court grant *Certiorari* and reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

LISA ANNE HOFFMAN
MARY BETH BURNS
Counsel of Record
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3565

Attorneys for Petitioner